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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NUMBER 152

LaHITTE, ET VIR

VS

ACME REFRIGERATION SUPPLIES INC., ET AL

Petition for Rehearing
of Order Denying
Petition for Writ of Certiorari

Your petitioners pray that this Court grant a rehearing of its order of October 9, 1967, denying the Petition for Writ of Certiorari, _____ US _____, and a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Louisiana, as prayed for in the original petition praying for a Writ of Certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING A WRIT OF CERTIORARI

The basic issue here is whether or not it is a violation of the Seventh Amendment of the United States Constitution for an appellate judge to deny a litigant a trial by jury when the State constitution of that state specifically authorizes a trial by jury (Article 7, Section 41 of the Louisiana Constitution).

Pursuant to Article 7, Section 41 of the Louisiana Constitution, a litigant has been accorded the right of trial by jury in civil matters. But this right of trial by jury is constantly usurped by the appellate structure of the State of Louisiana. As in the instant case, the appellate judges who do not see or hear the witnesses or bear through the trial are substituting their opinions of fact for what might have been or could have been the facts.

The framers of the Louisiana Constitution gave a mandate to the Legislature of Louisiana to institute a trial by jury. The Louisiana Constitution, Article 7, Section 41, provides:

> "The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases ...." (Emphasis supplied)

The Louisiana Constitutional provision affording a litigant a trial by jury is in accord with the United States Constitution and the fundamental rights provided therein; but the Louisiana Constitution also has a provision of appellate review of facts (Article 7, Section 29) which is not in accord with the United States Constitution, and contraiwise is in violation of the Seventh Amendment to the United States Constitution. These petitioners are asking the United States Supreme Court to hold that through the Supremacy Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, that the Seventh Amendment of the United States Constitution invalidates and voids Article 7, Section 29 of the Louisiana Constitution and any other Louisiana statute violating the petitioners' right to a real trial by jury.

As was noted by the U. S. Supreme Court in Turner v. State of Louisiana (1965) 379 US 466, 85 S Ct 1157, the State of Louisiana had granted a trial by jury in criminal matters, and once granted it had to be a real right:

> "This case does not involve the question whether the Fourteenth Amendment requires a state to accord a jury trial to a defendant charged with murder. The question, rather, goes to the nature

> of a jury trial which the Fourteenth Amendment commands when trial by jury is what the state has purported to accord.
> ...
>
> The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality — an appendage — of the court, the body ordained to pass upon guilt or innocence...."
> (Emphasis supplied)

The State of Louisiana has granted to litigants the right of a trial by jury, but because of the provisions allowing an appellate review of facts a trial by jury in Louisiana is but a sham, all in violation of the Seventh Amendment of the United States Constitution.

Historically and traditionally, the citizens of Louisiana had been accorded rights as citizens of the United States as far back as the Treaty of Paris, 30 April 1803, wherein the Louisiana Purchase was accomplished. Article 3d of that Treaty provided:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." Treaty of Paris, April 1803, West's LSA Constitution of Louisiana, Volume 3, page 486.(Emphasis supplied)

The right to a trial by jury in civil cases was first recognized and accorded to citizens of Louisiana by the Federal Congress in an act of March 26, 1804, c. 38, 2 US Stat. 283, "An Act erecting Louisiana into two territories and providing for the temporary government thereof." Section 5 of that Act, provided:

> "In all criminal prosecutions which are capital, the trial shall be by a jury of 12 good and lawful men of the vicinage; and in all cases, criminal and civil, in the superior court, the trial shall be by a jury, if either of the parties require it ...."

In a subsequent Act of Congress for March 26, 1804, the Federal Congress gave powers to the Legislature of the Territory of Louisiana, that held in Section 4:

> "...The governor, by and with the advice and consent of the said legislative council, or of a majority of them, shall have power to alter, modify or repeal the laws which may be in force at the commencment of this act. Their lesiglative powers shall also extend to all the rightful subjects of legislation; but no law shall be valid which is inconsistent with the constitution and laws of United States...." (Emphasis supplied)

And when Louisiana was admitted to the Union as a state, the Admitting Act of 1812 demanded:

> "...and that the above condition, and also all other the conditions and terms contained in the third section of the act, the title whereof is hereinbefore cited, shall be considered, deemed and taken, fundamental conditions and terms, upon which the said state is incoporated in the Union..."

CONCLUSION

The petitioners submit that in the original petition and this petition for a rehearing, it has been shown that the instant matter should be remanded back to the trial court for a real trial by jury. The petitioners are asking for no new rights. Instead, the petitioners pray that their rights as originally recognized by both the state and federal constitution be accorded to the petitioners.

WHEREFORE, for the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that a rehearing be granted and that the Court withdraw its order of October 9, 1967, refusing the Petition for Writ of Certiorari herein, and that the Court issue a Writ of Certiorari to the Supreme Court of the State of Louisiana.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

CHARLES R. MALONEY

PROOF OF SERVICE

I, Charles R. Maloney, attorney for the petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served a copy of the foregoing Petition for Rehearing on Mr. F. Lozes, of Messrs. Drury and Lozes, by mailing a copy of the same to their office at the National Bank of Commerce Building, New Orleans, Louisiana, on this day, November _____, 1967.

CHARLES R. MALONEY